No. 82-5698

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

HUGH W. MELSON, Petitioner

vs

STATE OF TENNESSEE

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

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QUESTIONS PRESENTED

I. Whether the evidence presented at trial was sufficent to convict the Petitioner of murder in the first degree beyond a reasonable doubt as required by the due process clause of the Fourteenth Amendment.

II. Whether the Petitioner's Eighth Amendment rights were violated by the fixing of excessive bail.

III. Whether the Petitioner's rights to a fair and impartial trial as guaranteed by the Sixth Amendment to the United States Constitution, and to due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution were violated.

IV. Whether the Petitioner's Sixth Amendment right to a fair and impartial trial and his Fourteenth Amendment right to due process were violated by admission of certain photographs of the victim.

V. Whether the Petitioner's Sixth Amendment right to a fair and impartial trial and his Fourteenth Amendment right to due process were violated by admission of evidence of various types of testing.

VI. The Petitioner's right to an impartial jury under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution was violated by imposition of a "Death Qualified" jury and by excusal for cause of all who opposed the death penalty.

VII. Whether the Petitioner's Sixth Amendment rights to effective assistance of counsel and his Fourteenth Amendment right to due process were violated by the refusal of the Trial Court to grant a continuance of the trial.

VIII. Whether the Petitioner's Fourth Amendment right was violated by his arrest made without probable cause.

IX. Whether the Petitioner's Fourth Amendment right was violated through seizure of Petitioner's property obtained after the illegal arrest of the Petitioner.

X. Whether the Petitioner's Fourth Amendment right was violated because of a search conducted by authority of an invalid search warrant.

XI. Whether the Petitioner's Fourth Amendment right was violated through seizure of Petitioner's property by authority of an invalid search warrant.

XII. Whether the Tennessee Death Penalty Act is unconstitutional because it violates the Eighth and Fourteenth Amendments to the Constitution of the United States.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

TENNESSEE CODE ANNOTATED

OPINION BELOW

The opinion below of the Supreme Court of Tennessee appears in the Appendix as A-1 and is reported as State v. Melson, 638 S.W.2d 342 (Tenn. 1982). The Order on Petition to Rehear was filed September 7, 1982, and appears in the Appendix as A-2.

JURISDICTION

The judgment and opinion of the Supreme Court of Tennessee was filed August 16, 1982. A Petition to Rehear was denied on September 7, 1982. This Petition for Writ of Certiorari is filed within the time allowed by this Court. This Court's jurisdiction is invoked under 28 U.S.C. §1257 and 28 U.S.C. §2101.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The following amendments are set forth in the Appendix: U.S. Const. Amend. IV, VI, VIII and XIV.

The following statutes are set forth in the Appendix: T.C.A. §§ 2404 and 2406.

STATEMENT OF THE CASE

Reference to the Statement of the Evidence (transcript of the proceedings) will be designated by the abbreviation "S.E." Reference to the technical record will be designated by the abbreviation "T." Reference to Exhibits will be designated by the abbreviation "E."

The Petitioner, HUGH W. MELSON, was arrested on April 10, 1980 at approximately 4:00 p.m. (S.E. 668). The arrest occurred within one hour of the discovery of the body of the wife of the Petitioner's employer (S.E. 558-560), who had last been seen alive earlier that same afternoon (S.E. 849-851).

The Petitioner was indicted on May 5, 1980 (T. 2-5), by the Madison County, Tennessee Grand Jury.

On May 12, 1980, the Petitioner filed a motion to set bail (T. 6-7) and at a subsequent hearing on May 16, 1980, bail was set at $200,000.00. On September 26, 1980, the Petitioner filed a motion to reduce bail (T. 74-75), which was denied. On May 23, 1980, the Petitioner filed a motion for change of venue with supporting documentation (T. 8-10),

which was denied. On September 3, 1980, the Petitioner filed a motion for the release of tangible evidence to him for testing (T. 60-61), which was granted. A motion to suppress evidence obtained in the course of the Petitioner's arrest and during the search of his vehicle was filed on September 26, 1980, and was denied. Also on September 26, 1980, Petitioner filed a motion to prevent disqualification of jurors based on their views of capital punisment (challenging "death qualification" on voire dire) (T. 67-68), and a motion challenging the constitutionality of the Tennessee statute providing for imposition of the death penalty (T. 71-72); both were denied. On September 29, 1980, a motion to suppress certain photographs of the victim was filed (T. 81-82), which was denied. On October 6, 1980, a motion to allow the Petitioner to participate in his defense at trial (T. 87-88), and a motion for continuance (T. 83-83C) were filed, both of which were denied.

The trial of the cause was held October 14-17, 1980. The jury found the Petitioner guilty of first degree murder and fixed his punishment at death after a bifurcated hearing (T. 123-124). The jury unanimously found the following statutory aggravating circumstances:

(5) The murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind.

(6) The murder was committed for the purpose of avoiding, interfering with , or preventing a lawful arrest or prosecution of the defendant or another.

The Petitioner perfected his appeal to the Tennessee Supreme Court in a timely manner. The Supreme Court affirmed the conviction on August 16, 1982. See State v. Melson, 638 S.W.2d 342 (Tenn. 1982), and A-1 of the Appendix. All questions raised before this Court were presented to the Tennessee Supreme Court for review.

A recitation of the facts will not be presented here, but such facts as may be relevant will be set forth as necessary in the substantive argument which follows.

ARGUMENT

I. WHETHER THE EVIDENCE PRESENTED AT TRIAL WAS SUFFICIENT TO CONVICT THE PETITIONER OF MURDER IN THE FIRST DEGREE BEYOND A REASONABLE DOUBT AS REQUIRED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

The theory of the State in this case is that the Petitioner and the victim, who was the wife of the Petitioner's employer, argued over the logging of ten gallons of gasoline in a log book. Kimba Lawrence, the victim's daughter-in-law, testified that the victim told Ms. Lawrence that she (the victim) was upset and wanted to stay at the house (S.E. 562). This was at 9:00 a.m. on the day of the murder. The Petitioner had been at the house earlier as he had been instructed by his employer (S.E. 887). Mattie Lewis, the maid, had overheard what she thought to be an argument between the Petitioner and the victim concerning some gasoline (S.E. 840-841).

As an employee on the farm, for over twenty-two years, the Petitioner had gasoline privileges. However, because of thefts of gasoline, the Lawrences had moved the pump's switch and had begun to log the use of the gasoline (S.E. 888-889). On the morning of April 10, 1980, Mr. Lawrence had told everybody that the gasoline would be logged (S.E. 888).

The Petitioner was driving the "farm truck", that belonged to Dick Lawrence, a son of the employer, during the morning (S.E. 862-908).

Of the witnesses who testified, the last one to see the victim alive was Mattie Lewis, who testified that at 1:35 p.m., the victim took the witness to the witness' car which was parked elsewhere on the farm (S.E. 850). [The witness was probably confused about the time and meant 2:35 since the witness was still locked out of the house at 1:30 p.m. (S.E. 844.] After the witness had left in her car, she saw the Petitioner in the Petitioner's truck following her away from the Lawrence residence and noticed that someone else was in the truck (S.E. 851). This corresponds with the testimony of Henry Shanklin (another employee) and Mary Jones (a local store owner) concerning the Petitioner's trip to Jones Package Store (S.E. 971, 996-998). The following is an estimation of the Petitioner's location on April 10, 1980:

1:00 p.m.	arrived at Henry Shanklin's house (S.E. 955-958)
2:30-2:45 p.m.	left Henry Shanklin's house and arrived at Jones Package Store (S.E. 967-968, 971, 998)
2:45-3:00 p.m.	Petitioner separated from Henry Shanklin (S.E. 972)
3:00 p.m.	Petitioner was inside Henry Shanklin's house, drinking his beer when Jenny and Dora Ingram and Phyllis Tyson returned to Shanklin's house

(S.E. 668)
4:00-4:10 p.m. Petitioner arrested at Henry Shanklin's house (S.E. 668)

The Assistant County Medical Examiner, Dr. George Shannon, told Lt. James Jowers that the time of death was approximately 2:00 p.m. This information was related by Dr. Shannon on the night of April 10, 1980, or early the next morning of April 11, 1980. Further, Lt. Jowers testified that Dr. Shannon had never mentioned the time of 3:00 p.m. (S.E. 1150-1151). The Affidavit of Complaint filed in the Court of General Sessions for Madison County stated that Dr. Shannon estimated the time of death at 2:00 p.m. (T. 1a). Also, the Jackson Sun, in its April 13, 1980, edition stated: "Dr. George Shannon, Assistant County Medical Examiner, estimated Mrs. Lawrence died about 2:00 p.m. as a result of head injuries..." quoting the above-reference affidavit (Exhibit to Change Venue). However, at trial, Dr. Shannon stated that the time of death was 3:00 p.m. and that he never told anyone any other time (S.E. 939-940). This was not the only major inconsistency in the testimony.

At trial, Mattie Lewis greatly embellished upon her testimony given at preliminary hearing and the hearing on the motion to suppress evidence. Her testimony at trial was also much expanded in comparison to the statement she gave to the sheriff's office (Cf, S.E. 841 and S.E. 16; and S.E. 846 and S.E. 17-18, S.E. 865-867). When questioned about the differences in her testimony at trial and the statement she gave the sheriff's office, she stated, "I didn't want to talk about it, " (S.E. 863).

While Mr. Lawrence testified that the Petitioner "had problems" with other employees (S.E. 886), all of the other witnesses who were asked responded that the Petitioner got along with everyone (S.E. 562, 951, 958).

Certainly the testimony of Kimba Lawrence that Barbara Lawrence, the victim, was "upset" that morning and didn't want to leave the house (S.E. 948-949) did not prove that the victim feared any violent action on the part of the Petitioner. The victim related that she didn't want to leave the house and then asked Kimba Lawrence to make a long drive to put two visitors on a highway (S.E. 949). Then,

the victim left the house later that morning to go out to lunch at 11:00 a.m. (S.E. 566), and then drove around town until 1:00 p.m. (S.E. 566). These are certainly not the actions of a woman who was afraid to leave her home. Also, Kimba Lawrence admitted that the victim didn't want to leave her house because the victim was afraid something would "come up missing" (S.E. 952). The victim did not indicate that she was in fear of bodily harm (S.E. 952). Further, Kimba Lawrence testified that the victim related "very little" about being upset during lunch (S.E. 566).

Further, the Petitioner questions the presence of a shirt not belonging to him (S.E. 1170) in his truck, which had human blood on it (S.E. 904, E. 30). His truck was apparently left unattended from the time of his arrest [4:10 p.m.] until it was towed to the police garage at 7:51 p.m. (S.E. 703). None of the items taken from the Petitioner's truck were checked for fingerprints (S.E. 758).

There was no blood or human tissue found in the Petitioner's fingernail scrappings (S.E. 794-795).

The testing which was performed at the FBI laboratory was inconclusive and speculative. Agent Richard D. Watson testified that he examined the Petitioner's clothing, a wrench, and a hammer. He performed tests that revealed a small amount of human blood, but did not have a sufficient quantity of blood to "type" it, the witness could not have testified that it was the victim's blood because "that is an impossibility, in the science" (S.E. 794). Agent Michael P. Malone testified that he made several hair comparisons of hair found on the hammer (S.E. 822) and hair found on the victim's blouse (S.E. 818). While he said the hair from the hammer was "indistinguishable" from the victim's hairs, and that the hair found on the victim's blouse "matched" the Petitioner's hair sample (S.E. 819), he testified on cross-examination that hair comparisons "do not constitute a basis for positive personal identification (S.E. 831) as the FBI report stated. There was absolutely no evidence that any of these test results could prove any of the conclusions which were being stated in that regard.

The testimony of H.L. MacDonnell was based upon microscopic examination in a field of science not previously recognized in Tennessee

(S.E. 1105) and of which he appears to be one of the few experts, if not the only expert, in this field (S.E. 1101).

The Petitioner contends that the evidence was insufficient to sustain a verdict of guilty on first degree murder. There was not proof beyond a reasonable doubt to any rational trier of fact. Jackson v. Virginia, 443 U.S. 307 (1979). Therefore, the conviction of the Petitioner for first degree murder with the resulting sentence of death by electrocution was a violation of the Petitioner's due process rights under the Fourteenth Amendment to the United States Constitution.

II. WHETHER THE PETITIONER'S EIGHTH AMENDMENT RIGHTS WERE VIOLATED BY THE FIXING OF EXCESSIVE BAIL.

On May 12, 1980, the Petitioner filed a motion to set bail in his case (T. 6-7). A hearing was had on the motion on May 16, 1980. The Trial Court fixed the Petitioner's bond at $200,000.00.

On September 26, 1980, the Petitioner filed a motion to reduce the $200,000.00 bond previously set by the Court (T. 74-75). A hearing was had on October 3, 1980, at which time the Trial Court declined to reduce the amount as previously fixed.

It is the Petitioner's contention that the fixing of bail at $200,000.00, and the subsequent denial of the motion to reduce bail, constitutes "excessive bail." This Supreme Court of the United States has construed the "excessive bail" clause of the Eighth Amendment to the circumstances of each individual defendant, in an amount no greater than is necessary to assure the defendant's appearance. Bandy v. United States 364 U.S. 477 (1960); Stack v. Boyle, 342 U.S. 1 (1951).

The guarantee against excessive bail is fundamental. To set bail in an amount which assures that the defendant cannot be released is a violation of his right to bail as guaranteed by the United States Constitution.

III. WHETHER THE PETITIONER'S RIGHTS TO A FAIR AND IMPARTIAL TRIAL AS GUARANTEED BY THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION, AND TO DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION WERE VIOLATED.

The Petitioner was indicted on May 5, 1980, (T. 2-4). On May 23, 1980, the Petitioner filed a motion for change of venue (T. 8). In

support of the motion, the Petitioner filed a collective exhibit marked "A", which included copies of newspaper articles, and information regarding radio and television coverage. The Petitioner submitted one hundred and seventy (170) affidavits collected from attorneys (Exhibit "B"), Madison County residents (Exhibit "C") and from residents of surrounding counties (Exhibit "D"). The affidavits support the Petitioner' contention that a fair and impartial trial could not be had in Madison County or the surrounding counties due to widespread publicity received by the case.

On May 30, 1980, the Trial Court conducted a hearing on the motion, they denied the Petitioner's request (T. 51).

The voir dire lasted approximately one and one-half days (S.E. vol. 1-4). The Petitioner used all of the peremptory challenges alloted to him by statute (S.E. 510). During the examination of the prospective jurors, it was discovered that almost without exception, all had either heard about the murder on radio or television, or had read the accounts in one or more of the newspapers (S.E. 41, 163, 268, 324, 426, 49

Of the twelve jurors and one alternate juror who served on the case, only one person, Bobby J. Pruitt, had not been exposed to the pre-trial publicity (S.E. 511). In addition, Jimmy Barnes had overheard discussions at work concerning the case (S.E. 72). Flewellen Jenkins knew one of the victim's family members (who was in the courtroom) (S.E 461) and Mrs. Grady Clements had attended college with the victim (S.E. 47 This panel cannot be viewed as fair and impartial by any standard. The Petitioner was powerless to further challenge the panel, having used all of his peremptory challenges.

The Petitioner asserts that he has proven that a change of venue should have been granted and that the failure to do so has deprived him of life and liberty without due process of law in contravention of the Fourteenth Amendment to the United States Constitution, and has deprived him of his right to a fair and impartial trial in contravention of the Sixth Amendment to the United States Constitution. See, Rideau v. Louisiana, 373 U.S. 732 (1963); Irvin v. Dowd, 366 U.S. 717 (1961).

IV. WHETHER THE PETITIONER'S SIXTH AMENDMENT RIGHT TO A FAIR AND IMPARTIAL TRIAL AND HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS WERE VIOLATED BY ADMISSION OF CERTAIN PHOTOGRAPHS OF THE VICTIM.

The Petitioner objected to the introduction of photographs (S.E. 602 and Defendant's Motion to Suppress Use of Photographs at T. 81-82) because there was no dispute over this fact of the victim's death, and due to the gruesome nature of the photographs, their probative value and relevance were outweighed by their prejudicial effect. Therefore, the admission of said photographs violated the Petitioner's Fourteenth and Sixth Amendment rights.

V. WHETHER THE PETITIONER'S SIXTH AMENDMENT RIGHT TO A FAIR AND IMPARTIAL TRIAL AND HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS WERE VIOLATED BY ADMISSION OF EVIDENCE OF VARIOUS TYPES OF TESTING.

By a motion in limine to suppress certain evidence (T. 81), the Petitioner objected to the State's use of either reports or personnel from the Federal Bureau of Investigation concerning chemical analysis of clothing and items taken from the Petitioner. The Petitioner asserts that the results of the Federal Bureau of Investigation analysis are so speculative and indefinite as to be without probative value. Certain blood and hair samples were examined by the Federal Bureau of Investigation but the report from said agency reveals that "it is pointed out that hair comparisons do not constitute the basis for positive personal identification." (S.E. 831) Blood samples were only identified as human blood within certain broad blood groupings. No positive blood type identification could be made. (S.E. 771) It is the Petitioner's contention that the results of the blood examinations were so indefinite as to be inconclusive insofar as the Petitioner was concerned.

The Petitioner objected to the testimony of Herbert L. MacDonnell, who placed before the jury his theories concerning blood spatter patterns, in that he was not an expert in any recognized science in the State of Tennessee (S.E. 1105). Further, his evaluation was based upon speculation (S.E. 1092-1094).

The questions raised before this Court were directly considered in United States v. Brady, 595 F.2d 359(6th Cir. 1979) [hereinafter cited as Brady]. Using the four-prong test established in United States v. Brown, 557 F.2d 541 (6th Cir. 1977) [hereinafter cited as Brown], the

Court considered expert testimony, permitted by the trial Court, based upon hair comparisons conducted through the use of an optical microscope. The Petitioner contends that three of the four "prongs" have not been met by the State in the testimony concerning the blood samples and the testimony concerning the hair comparisons, and that none of the "prongs" have been met concerning "blood spatter." The nature and the results of the testing performed by both witnesses were so speculative as to have no probative value, but great prejudicial effect. Therefore, the Petitioner's Fourteenth and Sixth Amendment rights under the United States Constitution were violated.

VI. THE PETITIONER'S RIGHT TO AN IMPARTIAL JURY UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WAS VIOLATED BY IMPOSITION OF A "DEATH QUALIFIED" JURY AND BY EXCUSAL FOR CAUSE OF ALL WHO OPPOSED THE DEATH PENALTY.

The following prospective jurors were excused for cause, based upon their view that they could not impose the death penalty: Clara Young (S.E. 140-142); Myrtle Monroe (S.E. 218-221); Frances Adams was excused even though she said, "I guess I might consider it." (S.E. 276); Harry Knight (S.E. 326); Robert Price (S.E. 377); Thomas Bullock was excused because he said he could not impose the death penalty in this case (S.E. 518); and Lawrence Lanier (S.E. 520).

However, a challenge for cause of Mr. W. T. Woods, who stated that he would impose the death penalty because of the nature of the crime (T. 225), was overruled (T. 228-229).

The exclusion for cause of venire members opposed to capital punishment violates the exacting standards of the Sixth Amendment. As the Court stated in Witherspoon v. Illinois, 391 U.S. 510, 519 A. 15 (1968) "one of the most important functions any jury can perform ... is to maintain a link between contemporary community values and the penal system." For this reason, the systematic exclusion of death-scrupled jurors for cause produces a wholly different practical effect, and presents a wholly different legal question, than exclusions for cause upon other commonly recognized grounds. With this excision, the Petitioner's Sixth Amendment interest in a jury impartial drawn from a cross-section of the community is seriously impaired. Cf, Witherspoon, supra, at 513-514; Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1977).

An essential ingredient of any death-sentencing procedure is the jury's ability to " 'maintain a link between contemporary community values and the penal system'." Woodson v. North Carolina, 428 U.S. 280, 295 (1976). This ingredient is required by the Eighth Amendment. Juries selected by the systematic exclusion of every venire member who will not impose a death sentence cannot possibly perform the vital constitutional function assigned to capital jurors by the Court's decisions in Gregg v. Georgia, 428 U.S. 153 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976); and Roberts v. Louisiana, 428 U.S. 325 (1976). Accordingly, death-qualifying a jury substantially impairs a defendant's Eighth Amendment right to a jury reflecting contemporary community values on the issue of punishment. Petitioner asserts that any form of death qualification of the jury at a capital trial violates the Sixth, Eighth and Fourteenth Amendments of the United States Constitution, and that under the facts of this case, his rights have been violated.

VII. WHETHER THE PETITIONER'S SIXTH AMENDMENT RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL AND HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS WERE VIOLATED BY THE REFUSAL OF THE TRIAL COURT TO GRANT A CONTINUANCE OF THE TRIAL.

The first reason this case should have been continued was to allow the defense more time to prepare to rebute the testimony of witness Herbert MacDonnell, presented as an expert witness by the State. It was encumbent upon the trial Court to allow the defense time to find an expert witness who can acquaint the defense with the matters of which the State's witness will testify, and to assist the defense in preparing their cross-examination of this "expert" witness.

Ms. Judith Bunker, the defense's intended witness on blood patterns, was not mailed the tangible, physical evidence until September 9, 1980. For approximately five months prior to the mailing of the evidence to Ms. Bunker, this material was in the custody of the prosecution and was in various stages of examination by their expert witnesses. Ms. Bunker, the defense's proposed witness, had less than 28 days to receive, examine, report on and mail back to the prosecution the tangible, physical evidence. Ms. Bunker resides in Florida and conducts her business there and by the very nature of her work, she was one of the few people qualified in the area of blood spatter and thus has a large backlog of work to be

done. (See Petitioner's counsel's affidavit to their Motion for Continuance and the letter of Ms. Judith Bunker of Orlando, Florida, subsequently submitted thereto). (T. 83-83C)

The second reason that the Trial Court should have granted a continuance is because as of October 6, 1980, defense counsel had not received a report of the psychiatric testing performed on behalf of the prosecution at the Middle Tennessee Mental Health Institute.

The third reason that a continuance should have been granted is because defense counsel only became aware of the assistance which could be offered by the Southern Poverty Law Center on October 2, 1980. Before this time, the availability of these resouces was unknown to the defense. Defense counsel would submit, as this Court is well aware, that expertise in a specialized field can be of tremendous value in preparing a defense. Since Petitioner was in custody, the State would suffer no injury from a continuance, but Petitioner would have gained immense help in the preparation of his defense had the continuance been granted. Therefore, failure to grant a continuance, which would have been no detriment to the State, but of great benefit to the Petitioner, constitutes abuse of discretion. This is especially true in light of the higher standard of due process that is required in a capital case. Gardner v. Florida, 430 U.S. 349 (1977).

The defense was hampered in three separate, distinct and important areas described above in the preparation of their defense of this action, and thus were unable to adequately and sufficiently prepare for trial. Therefore, the Petitioner's Sixth and Fourteenth Amendment rights were violated.

VIII. WHETHER THE PETITIONER'S FOURTH AMENDMENT RIGHT WAS VIOLATED BY HIS ARREST MADE WITHOUT PROBABLE CAUSE.

By motion filed on September 26, 1980, the Petitioner moved the Court to suppress any and all items which were seized as a result of the illegal arrest of the Petitioner on April 10, 1980. (T. 65-66).

The hearing on the Petitioner's motion to suppress was held on October 13, 1980 (S.E. 6 et. seq.) and was concluded during the trial after the arrival of an out-of-state witness (S.E. 945 et. seq.). Gene Martindale, a photographer with the Jackson Sun testified that he took

pictures relating to the case on April 10, 1980, the date the Petitioner was arrested. Two photographs of the Petitioner being brought to the Courthouse on that date were produced by the witness (S.E. 7). The photograph which appeared in the newspaper and an enlargement of the same picture were admitted into evidence (S.E. 10).

These photographs clearly showed that blood was not noticeable on the Petitioner's clothing at the time of his arrest. This fact is confirmed by the testimony of arresting officer David Woolfork, who testified that he did not notice any blood on the Petitioner's clothing until after the Petitioner had been handcuffed, placed in the car, and taken to the Lawrence house (S.E. 678-683). Officer William F. Page testified that he did not notice any blood at first on the Petitioner, but did notice some after Officer Page got into the car with the Petitioner (S.E. 641-643). Therefore, the Petitioner was not arrested because of any blood on his clothing.

There can be no question that the Petitioner was arrested at the house of Henry Shanklin. The Petitioner was taken into custody, handcuffed and placed into the patrol car for transportation to the Lawrence home (S.E. 678-679). At that time, all the officers knew was that the Petitioner had an argument with the victim that morning (S.E. 948). There was no history of violence between the Petitioner and the victim--the Petitioner had never threatened or struck any of the Lawrence family members (S.E. 951). The officers came into contact with the Petitioner, who was on the Lawrence farm approximately one-fourth (1/4) mile from the house where the victim was found (S.E. 667). The Petitioner came out of that house willingly (S.E. 681) and did not attempt to flee or resist in any way (S.E. 681).

The Trial Court recognized that "this has created some problem and probably is a close question," in ruling that there had been probable cause for the arrest (S.E. 954). The Petitioner submits that the question of whether there was probable cause for a warrantless arrest is not even close. The constitutional protection against such arrest was written into the Constitution of the United States to guard against just this type of intrusion upon the citizenry. The Sixth Circuit Court of Appeals has stated that "[p]robable cause means 'more than bare

suspicion.' It means 'reasonable ground for belief of guilt,'" citing Brinegar v. United States, 338 U.S. 160, 175 (1949). United States v. Lewis, 504 F.2d 92 (6th Cir. 1974).

Based upon these facts, there was no probable cause for arrest without a warrant. Therefore, the Petitioner's right under the Fourth Amendment was violated.

IX. WHETHER THE PETITIONER'S FOURTH AMENDMENT RIGHT WAS VIOLATED THROUGH SEIZURE OF PETITIONER'S PROPERTY OBTAINED AFTER THE ILLEGAL ARREST OF THE PETITIONER.

The Petitioner was arrested at approximately 4:10 p.m. (S.E. 668). He was transported to the jail and at 4:35 p.m. the officers removed the Petitioner's shirt,pants, cap and boots (S.E. 673-674). The Petitioner asserts that since his arrest was invalid, the subsequent seizure of all property from him was also invalid.

There is no question that the protection of the Fourth Amendment to the United States Constitution has been extended in the States through the protections of the Fourteenth Amendment. Mapp v. Ohio, 367 U.S. 643 (1961).

After an illegal arrest has occurred, nothing that happens thereafter can make the arrest lawful, or justify a search of its incident. Rios v. United States, 364 U.S. 253 (1960). Therefore, all evidence obtained as a result of the arrest in this case was inadmissable, and should have been suppressed. Wong Sun v U.S., 371 U.S. 471 (1963); Henry v. United States, 361 U.S. 98 (1959).

X. WHETHER THE PETITIONER'S FOURTH AMENDMENT RIGHT WAS VIOLATED BECAUSE OF A SEARCH CONDUCTED BY AUTHORITY OF AN INVALID SEARCH WARRANT.

A. The search warrant is invalid because the warrant was issued upon evidence consisting in material part of reckless misrepresentation of the applicant to the issuing magistrate.

The affidavit for search warrant (T. 107-108), executed by "Jim Jowers" contains reckless misrepresentations of material facts. The affidavit states that the Petitioner left Henry Shanklin's residence at 2:00 p.m., which according to the affidavit, was the time of the

victim's death fixed by Dr. George Shannon, the Assistant County Medical Examiner. However, the combined testimony of Henry Shanklin (S.E. 26-28) and Mary Jones (S.E. 12), fixed the time that Shanklin and the Petitioner separated at approximately 2:45 p.m. that day, after Shanklin and the Petitioner had been together since approximately 1:00 p.m., without separating (S.E. 28).

Also, the affidavit states that a "reliable source" states that the Petitioner was seen in his 1974 Ford pick-up "immediatley prior to the estimated time of her [the victim's] death." Lt. James Jowers testified at the preliminary hearing that Mattie Lewis gave him a statement, relating that she had talked with the Petitioner after she had locked herself out of the victim's house between 12:30 p.m. and 1:00 p.m. Jowers further testifies that no one placed the Petitioner at the residence at 2:00 p.m., which was the time of death fixed by the Assistant County Medical Examiner. The affiant knew that Mattie Lewis had seen the Petitioner between 12:30 and 1:00 p.m. and that Mattie Lewis saw the victim between 1:30 p.m. and 1:45 p.m. at the residence. Instead of giving this specific information, the affiant chose to couch his statement in a deceptive manner. This action on the part of the affiant, the Petitioner contends, could only have been undertaken to deceive the Court.

Taken in the most favorable view toward the affiant, these statements were certainly recklessly made and obviously essential to the establishment of probable cause. The affiant had in his possession specific information which would have certainly eliminated the inferences of the statements made in the affidavit instead.

B. The search warrant is invalid because there were no facts alleged which provided a nexus between the crime and the Petitioner's truck.

The affidavit before this Court alleged no facts to provide a nexus between the crime and the vehicle. Since the Petitioner's truck was seen by Mattie Lewis prior to the victim's return to the residence, the inference that the truck was seen at the house at the time of the murder has been destroyed. Without that inference, there are not facts

set forth in the affidavit which would lead to a reasonable conclusion that any evidence was in the Petitioner's truck. This nexus is a "critical element," citing Whitely v. Warden, 401 U.S. 560 (1971). This critical element is missing in the present case.

C. The search warrant is invalid because the affidavit does not contain a substantial basis for crediting the hearsay relied upon by the affiant nor the basis for the informant's knowledge.

The finding of probable cause for a search warrant can be based upon hearsay. However, the affidavit must also contain a substantial basis for crediting such hearsay. Spinelli v. United States, 393 U.S. 410 (1969); Rugendorf v. United States, 376 U.S. 528 (1964); Jones v. United States, 362 U.S. 257 (1960).

The affidavit must set forth enough facts and circumstances to permit the magistrate to measure the credibility of the information, and to reach an independent judgment as to whether the requisite probable cause exists. Spinelli v. United States, supra; accord, United States v. Harris, 403 U.S. 573 (1971). The affiant must give the magistrate more than the conclusory averment that the informant is "reliable." Aguilar v. Texas, 378 U.S. 108 (1964).

There can be no question about the affidavit in the present case. One unnamed source is only identified as "reliable" with no other supporting facts to allow the magistrate to determine the source's reliablity or the basis for the informant's knowledge. The other sources, Kimba B. Lawrence and Henry Shanklin, are named, but no supporting facts as to credibility are given.

D. The search warrant is invalid because it fails to describe with specificity the things to be seized.

Any search warrant issued by a magistrate must describe with specificity both the things to be seized and the place to be searched. Stanford v. Texas, 379 U.S. 476 (1965). The property for which seizure was authorized in this case is described in broad, general terms. The officer is empowered to seize " a blunt object, knife or object capable of being used to strike, stab, cut, penetrate and any other paraphernalia

pertaining to this incident." (Emphasis added). The lack of specificity on the face of the search warrant authorizes a general search, which is prohibited by the Fourth Amendment to the United States Constitution.

Innocuous property (in contrast to contraband) must be described more specifically so that executing officers will not be confused about the items sought and other property of a similar nature which might be found on the premises. United States v. Quantity of Extract, Bottles, Etc., 54 F.2d 643 (S.D.Fla. 1931).

In this case, the following items were seized from the Defendant's truck:

1. Three rags
2. Shirt
3. Portion of rug
4. Syringe
5. Hammer
6. Two wrenches

Obviously, the executing officers were confused between the items sought and other property. The cloth items do not even fall within the vague and overbroad description given, and neither does the syringe.

E. Whether the search and seizure by the officers exceed the authority of the search warrant.

While the affidavit for search warrant requests that the magistrate allow the search of the vehicle in question to include "all boxes and containers contained in said vehicle," the search warrant only described, and authorized the search of,a "1974 Ford pick-up, green in color, bearing Tennessee license number 7J469A, registered to Hugh W. Melson," without mention of the "boxes and containers." Therefore, the search of the boxes and containers, without proper authorization in the search warrant, is in excess of the search warrant.

In Marron v. United States, 272 U.S. 192 (1927), the warrant in question specified intoxicating liquor and articles for their manufacture. The Court held that seizure of a ledger was not authorized under the warrant (but found that the seizure was constitutional under an exception to the warrant requirement). As previously discussed, the search warrant and the subsequent search and seizure of the property under the warrant in the present case must be relied upon by the State,

as there is no exception applicable to the case at hand. Marron v. United States, supra, holds that the constitutional requirement that warrants shall particularly describe the things to be seized prevents the seizure of one thing under a warrant describing another. As to what should be seized, nothing is to be left to the discretion of the officer executing the warrant. The Marron decision was distinguished in the case of Coolidge v. New Hampshire, 403 U.S. 443 (1971), when the United States Supreme Court ruled that where an otherwise lawful search is in progress, and the police "inadvertantly" come upon a piece of evidence in "plain view," it is not necessary for the officer to obtain a warrant particularly describing the inadvertantly discovered item.

However, the argument of "inadvertant discovery" cannot be used to "bootstrap" all seizures made in a search. In the case at hand, it is clear from the affidavit for the search warrant that the officer knew of the existence and location of the boxes and containers, and that he intended to seize them. On that basis, the fact that the warrant fails to authorize the search and seizure of these items is fatal to the search and seizure of those specific items. See, North v. Superior Court, 502 P.2d 1305 (Cal. 1972). There can be no claim made that there was an "inadvertant" discovery.

Since the warrant did not authorize the search and seizure of the boxes and containers, there is a violation of the Fourth Amendment requirement that the warrant particularly describe the things to be seized.

XI. WHETHER THE PETITIONER'S FOURTH AMENDMENT RIGHT WAS VIOLATED THROUGH SEIZURE OF PETITIONER'S PROPERTY BY AUTHORITY OF AN INVALID SEARCH WARRANT.

The Petitioner was arrested at 4:10 p.m. on April 10, 1980 (S.E. 668). The Petitioner's truck was seized on April 10, 1980, without a search warrant, at approximately 7:51 p.m., at the Lawrence farm (S.E. 703). It was towed into the police garage (S.E.697). The next day, after a search warrant had been obtained, the truck was searched (S.E. 691, 700). The Petitioner asserts that the seizure of the truck and then the subsequent search by an invalid search warrant infringes upon his protection from unreasonable search and seizure. The State presented no evidence of exigent circumstances. The Petitioner was already in custody. The truck was on the Lawrence property, and there was no imminent danger

of loss of evidence, as a police officer could have been detailed to maintain surveillance of the truck. This action would have constituted a lesser intrusion until a search warrant could have been obtained. See, U.S. v. Van Leeuwen, 397 U.S. 249 (1970); contra, Chambers v. Maroney, 399 U.S. 42 (1970).

The Petitioner argues that (1) there were no exigent circumstances involved, and no reason given for foregoing the procurement of a search warrant to seize the Petitioner's truck; and (2) the search warrant which was eventually procured by the Sheriff's office was invalid. Therefore, the use of the property seized as potential evidence should have been suppressed. Therefore, there has been a violation of the Petitioner's Fourth Amendment Rights.

XII. WHETHER THE TENNESSEE DEATH PENALTY ACT IS UNCONSTITUTIONAL BECAUSE IT VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

A. The statutory aggravating circumstances used against the Petitioner under the statute are void for vagueness and overbreadth and do not apply to the Petitioner under the circumstances of this case.

The aggravating circumstances set forth in T.C.A. §39-2404 (i) (5) and (6) were found to be present and not outweighed by mitigating factors by the jury in this case. Aggravating circumstance number 5 is "the murder was especially heinous, atrocious or cruel in that it involved torture or depravity of mind" and aggravating circumstance number 6 is "the murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the Defendant or another."

With reference to circumstance (5), the Petitioner contends that it is impermissably vague, in that the jurors were given no instructio on what constitutes "depravity of mind." Clearly, the word torture used in the aggravating circumstance is within their common knowledge and understanding. However, "depravity of mind" needs definition before they may apply it. In this regard, the victim in this case clearly was not tortured, as her death due to a skull fracture came swiftly and quickly (S.E. 1013, 1032).

In Godfrey v. Georgia, 446 U.S. 420 (1980), [hereinafter cited

as Godfrey], citing the Georgia Supreme Court construing a very similar Georgia statute, the Court found that the Georgia Supreme Court interpreted the phrase "depravity of mind" to encompass "only the kind of mental state that lead the murderer to torture or commit aggravated battery before killing his victim." Aggravated battery was found to be construed in pari materia with torture so as to require evidence of serious physical abuse to the victim before death.

In the present context and under the above interpretations under Godfrey, the Petitioner should be found not to have committed the aggravating circumstance number 5 with which he has been charged. As noted above, the victim's death came swiftly and quickly and therefore she could not have been tortured or otherwise physically abused prior to death. Thus, if there was no torture prior to death, then "depravity of mind" cannot be found in the present context under the holding of Godfrey.

In regard to aggravating circumstance number 6, that "the murder was committed for the purpose of avoiding, interfering with or preventing a lawful arrest or prosecution of the Defendant or another", the Petitioner submits that the statute is vague and overbroad on its face, and as applied in this particular case. This aggravating circumstance is so broad that it encompasses any murder. It could be argued that any murder in which the assailant does not step forward and immediately admit guilt is committed for the purpose of avoiding and preventing a lawful arrest or prosecution. In addition, in this case the jury was not charged with, nor were they made aware of, any circumstances which might merit a lawful arrest or prosecution of which the Petitioner might have then been attempting to avoid. Clearly the victim did not intend to arrest or prosecute the Petitioner or she would have taken these steps prior to her death. At most, it simply would have lead to his dismissal from his employment.

B. Petitioner's sentence of death is excessive or disproportionate to the penalty imposed in similar cases considering both the nature of the crime and the Defendant.

T.C.A. §39-2406 (c)(4) provides that part of the Tennessee Supreme Court's task in reviewing a death sentence is to determine

whether "the sentence is excessive or disproportionate to the penalty imposed in similar cases, considering both the nature of the crime and the defendant." The Petitioner contends that there are substantial deficiencies in the statutory scheme concerning proportionality review which render it constitutionally deficient. However, even if that statutory scheme is found to be constitutionally adequate, Petitioner submits that his sentence is disproportionate to the penalty imposed in similar cases considering both the nature of the crime and the Petitioner.

Petitioner's counsel, in reviewing the limited sources available to them in similar cases, has concluded that there are five cases similar to Petitioner's case which should be compared in determining whether his sentence is disproportionate to other similar cases. All six of these cases are similar, "considering both the nature of the crime and the defendant." They involve crimes similar in their circumstances and defendants similarly culpable. The only differences in these cases, however, is that Petitioner was sentenced to death and four of the other men were sentenced to life imprisonment (one case has been remanded for a new sentence hearing). On the basis of the facts available about all six of these cases, the differences in the sentences imposed on the individuals cannot be justified. Under no view of the facts of all six cases is Mr. Melson a "worse" person or is his crime a "worse" crime. The results here are, therefore, precisely the kind of aberrant results which proportionality review is designed to prevent. Gregg v. Georgia, 428 U.S. 153, at 206 (1976).

C. The review procedure for conducting proportionality review in Tennessee does not serve as a check against the random or arbitrary imposition of the death penalty and does not comply with the constitutional review and requirements.

T.C.A. §29-2406, *governing review of capital* sentences by the Tennessee Supreme Court provides that in a death penalty appeal the Supreme Court shall consider the punishment as well as any errors enumerated by way of appeal. With regard to the sentence, the Court is required, among other things, to determine "whether ... the sentence of

death is excessive or disproportionate to the penalty imposed in similar cases, considering both the nature of the crime and the defendant." T.C.A. §39-2406 (c) (4).

The review provisions of T.C.A. §39-2406 were adopted literally from the parallel provisions of Georgia's death penalty statute affirmed by this Court in Gregg v. Georgia, 428 U.S. 153 (1976). Those provisions in Georgia's statute have been found by this Court to be a critically important component in the Georgia statute's attempt to avoid the arbitrary imposition of the death penalty previously condemned in Furman v. Georgia, 408 U.S. 238 (1972).

The review provisions of T.C.A. § 39-2406 require this Court to make the same kind of determination that the Georgia Supreme Court makes under its law, but provides the Court with no procedure parallel to that used in Georgia to perform the task. This procedure does not enable the Court to proceed with this sentence review in a manner that is efficient, fair, reliable, and in compliance with the requirements of Gregg and its companion cases.

D. Failure to inform the jury that under the Tennessee death penalty act one juror can prevent a death sentence denies the Defendant due process of law.

The Petitioner submits that the guidance given to the jury should be complete and must include not only the unanimous verdict requirements in T.C.A. §39-2404(f), but also the alternative if they can't reach a unanimous decision ... an alternative that is prohibited in T.C.A. §39-2404(h). To instruct the jury in terms of what will happen if they "unanimously determine" aggravating circumstances, T.C.A. §39-2404 (f) and (g), without informing them of the alternative if they fail to reach a unanimous verdict, implies that some form of unanimous decision is required. However, this represents an incorrect understanding of the law, for "[i]f the jury cannot ultimately agree as to the punishment, the judge shall dismiss the jury and the judge shall impose a sentence of life imprisonment," T.C.A. §39-2404(h). With an incomplete instruction, the jurors are left to speculate that a defendant might be retried or subject to a new sentencing hearing if they fail to achieve

unanimity.

T.C.A. §39-2404(h) does not justify the failure to give this instruction. As the Petitioner has demonstrated, there is a constitutional underpinning for the need for this instruction, since it insures that the decision to impose the death sentence meets the concerns addressed in numerous desicions of the Supreme Court of the United States. See, e.g., Gardner v. Florida, 430 U.S. 349 (1977); Gregg v. Georgia, 428 U.S. 153, 189 (1976); Furman v. Georgia, 408 U.S. 238 (1972). Therefore, a legislative pronouncement that inevitably leads to the introduction of a "level of uncertainty and unreliability into the fact-finding porcess ... cannot be tolerated in a capital case." Beck v. Alabama, 447 U.S. 625 (1980).

E. T.C.A. §39-2404(j) is unconstitutional in that is violates the Petitioner's right to even-handed procedures in capital cases guaranteed by the Eighth and Fourteenth Amendments of the United States Constitution, failing to require the jury to make specific findings as to the presence or absence of mitigating circumstances and thereby preventing effective review on appeal under T.C.A. §39-2406(c)(3).

The due process requirements of the Fourteenth Amendment to the United States Constitution and the requirements of the Eighth Amendment to the United States Constitution demand that juries, in sentencing proceedings, be guided in considering both mitigating and aggravating circumstances. Lockett v. Ohio, 438 U.S. 586 (1978); Woodson v. North Carolina, 428 U.S. 280 (1976). Further, these Amendments require effective appellate review of death verdicts in order to insure that the sentencer has not over-stepped its bounds and arbitrarily imposed a death sentence. Godfrey v. Georgia, 446 U.S. 420 (1980); Gregg v. Georgia, 428 U.S. 153 (1976) (this Court approved, though did not require, proportionality review by the State Supreme Court).

The jury's failure to specifically find mitigating circumstances invites arbitrary and freakish application of the death sentence because on review this Court is presented with two separate findings of fact made by separate entities, one made by the jury and the other made by the Trial Court. The Court is then required to presume that the Trial

Court's findings on mitigating circumstances are the same as those actually found by the jury. Such a presumption violates all tenents of procedural fairness. Therefore, the proportionality review required of this Court by T.C.A. §39-2406(c) cannot be effectively conducted.

F. T.C.A. §39-2404(f) and §39-2404(g) are unconstitutional in that these sections deny the Petitioner due process guaranteed by the Fourteenth Amendment of the United States Constitution.

1. Failure to specify who has the burden of proof regarding whether the aggravating circumstances outweigh the mitigating circumstances; and

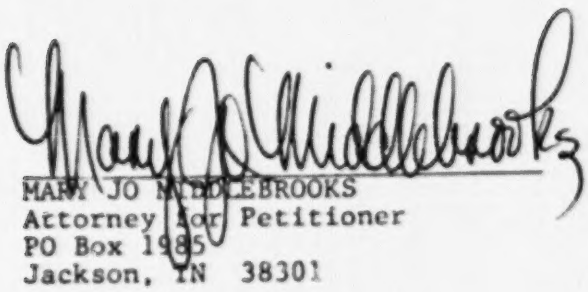
2. Failure to provide a standard of proof for determining whether the aggravating circumstances outweigh the mitigating circumstances.

The Petitioner contends that T.C.A. §39-2404(f) and (g) are unconstitutional in that these subsections fail to provide an adequate standard of proof whereby the jury may be informed as to who must prove that aggravating circumstances outweigh mitigating circumstances. Without being informed as to who must prove that aggravating circumstances outweigh mitigating circumstances, and without being given any guidance upon how to determine the weight of these circumstances, the jury is permitted the type of untrammeled discretion condemned in Furman v. Georgia, 408 U.S. 238 (1972).

CONCLUSION

For the reasons stated above, a Writ for Certiorari should be granted to review the judgment and opinion of the Supreme Court of Tennessee.

Respectfully submitted,



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